

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

February 14, 2005 Session

**RICK KYLE v. EARL WILLIAMS, ET AL.**

**Appeal from the Chancery Court for Monroe County  
No. 12614 Jerri S. Bryant, Chancellor**

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**No. E2004-00599-COA-R3-CV - FILED APRIL 28, 2005**

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Rick Kyle (“the plaintiff”), a contractor, entered into a contract with Earl Williams and his wife, Michelle Williams (collectively “the defendants”) to build them a house. When the house was approximately 90% complete, a basement wall collapsed. The plaintiff proposed a plan to remedy the problem. The defendants rejected the plaintiff’s plan and hired a new contractor to complete the construction. The plaintiff brought this action for breach of contract. The defendants responded with an answer, and coupled it with a counterclaim seeking their costs incurred in connection with the completion of the project. The defendants raised as an affirmative defense that the contractor was not licensed during all of the time he was working on the house. On interlocutory appeal to the Supreme Court, that court held that the plaintiff was “unlicensed” under the provisions of Tenn. Code Ann. § 62-6-103(b) and was therefore only entitled to recover his “actual documented expenses” under that statute. Following remand, the trial court, at a bench trial, awarded the plaintiff his “actual documented expenses,” less monies already paid to him by the defendants. It also awarded the defendants the expenses incurred by them as a result of the collapse of the wall. The plaintiff appeals. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court  
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

John A. Walker, Jr., Knoxville, Tennessee, and Van R. Michael, Sweetwater, Tennessee, for the appellant, Rick Kyle.

H. Chris Trew, Athens, Tennessee, for the appellees, Earl Williams and Michelle Williams.

**OPINION**

## I.

The parties' contract addresses the construction of a house in Monroe County. The contract provides that the house is to be "constructed in a good and workmanlike manner." It calls for a price of \$80,000. When the house was approximately 90% complete, the defendants paid the plaintiff \$35,000. Thereafter, a basement wall collapsed. The plaintiff offered to correct the problem; however, the defendants rejected his plan. The defendants later learned from an engineer that the wall was not constructed according to the applicable building code and acceptable practices. They then secured the services of another contractor – Jim Bob Contracting – to finish the house.

The plaintiff filed a complaint, in which he averred that he had been ready and willing to replace the basement wall. However, according to the complaint, the defendant completed the house with another contractor at a cost of \$25,000. The plaintiff claimed that he was due at least \$26,598.21 under the contract. The defendants filed their answer, in which they alleged that the basement wall collapsed due to the negligent manner in which it was constructed. The defendants further alleged that their cost to finish the house, when added to the \$35,000 previously paid to the plaintiff, exceeded the \$80,000 contract price. Consequently, they denied that the plaintiff was entitled to any recovery. As an affirmative defense, they alleged that the plaintiff did not have a valid contractor's license when he was working on the residence. The defendants also filed a counterclaim for damages incurred in (a) hiring an engineer, (b) rebuilding the wall, (c) completing construction of the house, and (d) making repairs stemming from the collapse of the wall. They further sought reimbursement for the rent incurred by them during the period of time they were prevented from moving into the house as a result of the collapsed wall. Finally, they sought the alleged reduction in the fair market value of the house.

Tenn. Code Ann. § 62-6-103(b) (Supp. 2004) provides that "[a]ny unlicensed contractor . . . shall be permitted in a court of equity to recover actual documented expenses only upon a showing of clear and convincing proof." The trial court held that, under the statute, a contractor who does not maintain his license throughout the time he is working and performing services under a contract is "unlicensed." From this, the trial court concluded that the plaintiff could only recover "actual documented expenses," and that, in any event, his recovery of those expenses was contingent upon his proving them by clear and convincing evidence. By order entered January 4, 2002, the trial court granted the plaintiff's motion for an interlocutory appeal. We denied the motion, but the Supreme Court granted review and subsequently affirmed the ruling of the trial court. *See Kyle v. Williams*, 98 S.W.3d 661 (Tenn. 2003). The Supreme Court remanded the case to the trial court for further proceedings.

At a bench trial following remand, the court received testimony from the parties and others. A number of invoices and checks were admitted into evidence as probative of both sides' respective expenses. The trial court also received testimony from Jerry Lambert, a licensed engineer called by the defendants. Mr. Lambert testified that the wall was negligently constructed. He also testified that he furnished the defendants with designs for repairing the basement walls.

By order entered February 18, 2004, the trial court alluded to certain exhibits or portions thereof which reflected expenses of the plaintiff that the court found to be proven by “clear and convincing evidence.” It concluded that the plaintiff was entitled to recover the amount of \$38,534.58. Since the plaintiff had already been paid \$35,000, he was awarded the balance of \$3,534.58. On the defendants’ counterclaim, the court held that they were entitled to recover \$37,237.64, which amount included the cost of rebuilding the foundation walls, the rent incurred as a result of the delay in moving into the house, the cost of Mr. Lambert’s engineering services, the cost of paint for the inside walls, and the cost of a mirror that was broken when the wall collapsed. The trial court entered its judgment on April 7, 2004. From this judgment, the plaintiff appeals.

## II.

On appeal, the plaintiff argues that his failure to have a contractor’s license caused the contract between the parties to be illegal and void. Therefore, so the argument goes, neither party can sue under the contract. The plaintiff also contends that the trial court did not have before it competent evidence as to how the house was completed, and therefore it erred in relying solely on the expenses testified to by the defendants.

## III.

Our review of the trial court’s judgment is *de novo* upon the record before us. Tenn. R. App. P. 13(d). With regard to the trial court’s findings of fact, we accord those determinations a presumption of correctness unless the evidence preponderates against them. *Id.* As to the trial court’s conclusions of law, there is no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

## IV.

The plaintiff’s first issue addresses the effect of the opinion of the Supreme Court in this case. He interprets that decision as effectively voiding the contract, thereby precluding the defendants from recovering for the plaintiff’s breach of the parties’ understandings. In support of this argument, he refers us to a portion of the Restatement which provides that a party “cannot disaffirm part of the contract that is particularly disadvantageous to himself while affirming a more advantageous part.” 3 Restatement (Second), Contracts § 383(a) (1979). Since, so the argument goes, the defendants precluded him from recovering under the contract by their allegation that he was unlicensed, they cannot now seek to recover their own damages under the same contract.

The question before the Supreme Court in the earlier appeal of this case was whether Tenn. Code Ann. § 62-6-103(b) applied to the facts of this case. That statute provides that “[a]ny unlicensed contractor . . . shall be permitted in a court of equity to recover actual documented expenses only upon a showing of clear and convincing proof.” Tenn. Code Ann. § 62-6-103(b). The plaintiff argued to the Supreme Court, among other things, that since he had a valid license when he commenced work under the contract, he was licensed and therefore entitled to recover under the

contract. *Kyle*, 98 S.W.3d at 664. The Supreme Court disagreed, and held that a person who engages in *any* contracting activities without a license is “unlicensed” under the statute, and, therefore, can only recover pursuant to the statute. *Id.* at 666.

The plaintiff now reads the Supreme Court’s holding that he was unlicensed as meaning that the contract between the parties is illegal and void. This is an incorrect reading of *Kyle*. First, the Supreme Court in *Kyle* did not expressly address the *legality* of the contract. Second, the plaintiff’s argument is inconsistent with prior rulings of the Supreme Court and this court. The effect of Tenn. Code Ann. § 62-6-103(b) is to permit an unlicensed contractor to recover actual documented expenses. The enactment of this statute effected a change in the law. *Id.* at 665.

In prior cases, we have applied this statute to limit a contractor’s recovery, but we have never opined that it had a limiting effect on the other party’s recovery. For example, in *Wiltcher v. Bradley*, 708 S.W.2d 407, 410 (Tenn. Ct. App. 1985), we modified the trial court’s order allowing the contractor to recover amounts expended on labor and materials on the ground that he was unlicensed at the time and failed to furnish any evidence of documented expenses. As to the trial court’s award to the owners, which included amounts expended in repairing defective work, we affirmed that decision. *Id.* at 411. Similarly, upon holding that a contractor was unlicensed, the Supreme Court remanded a case so that the contractor, who was not permitted to recover under the contract, could prove outstanding fees and labor. *Chedester v. Phillips*, 640 S.W.2d 207, 209 (Tenn. 1982). The owner, however, was permitted to show the damages suffered by it as a result of the contractor’s defective work, the appropriateness of repairs made, and an accounting of monies expended. *Id.* at 209. In *Phillips v. Russell*, No. 03A01-9509-CV-00298, 1996 WL 93583, at \*2 (Tenn. Ct. App. E.S., filed March 4, 1996), we limited the contractor’s recovery upon finding that he was unlicensed. In a separate discussion, we held that the contractor breached his contract with the owners by failing to construct the home in a workmanlike manner and that, consequently, the owners were entitled to recover damages relating to the breach. *Id.*, at \*4. In light of these cases, we specifically hold that a contractor’s unlicensed status, and limited right of recovery as a consequence of that status, does not void the contract as far as the right of the other party to recover for the contractor’s breach is concerned. Rather, the only purpose of the statute is to define and limit the recovery to which an unlicensed contractor is entitled.

## V.

The plaintiff also argues that the trial court erred in relying on facts not competently before it in determining the damages suffered by the defendants. In particular, the plaintiff argues that, although an engineer testified that he prepared plans for the redesign of the house, there was no testimony from the new contractor as to whether the engineer’s designs were implemented and no testimony that the defendants’ expenses were necessary or otherwise appropriate.

Upon review of the record before us, we find that the evidence does not preponderate against the award to the defendants. Jerry Lambert, the engineer called by the defendants, testified that the wall that collapsed was not built in accordance with standard building practices and the applicable

building code. He further testified that he provided an initial design for repairing the wall as well as an alternative plan that was more economical, and that the cost for his engineering services was \$1,900. Michelle Williams subsequently testified that after receiving estimates from two contractors, they chose Jim Bob Contracting, to whom they paid \$34,689.66 for the new construction of the basement and foundation, and jacking up the house. The checks reflecting these amounts, as well as expenses for making other repairs, were admitted into evidence through the testimony of the defendants.

The plaintiff does not contend in this case that any of the various *types* of damages are not recoverable. Rather, he argues, in effect, that the evidence preponderates against the judgment of the trial court in awarding these damages to the defendants. There was competent testimony pertaining to the damages awarded by the trial court and it is obvious that the court accredited that testimony when it awarded these damages. We find no error in the trial court's award of damages to the defendants.

## VI.

The judgment of the trial court is affirmed. This matter is remanded to the trial court for enforcement of its judgment and the collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Rick Kyle.

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CHARLES D. SUSANO, JR., JUDGE